

**BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC**

In the Matter of:

Akin Gump Strauss Hauer & Feld LLP
Petition for Expedited Clarification or
Declaratory Ruling

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CG Docket No. 02-278
CG Docket No. 05-338

REPLY COMMENTS OF NATIONAL ASSOCIATION OF MANUFACTURERS

The National Association of Manufacturers (“NAM”) respectfully submits the following reply comments supporting the Petition for Expedited Clarification or Declaratory Ruling (the “Petition”) of Akin Gump Strauss Hauer & Feld LLP (“Akin Gump”). Akin Gump requests that the Commission clarify what it meant in the *2006 Junk Fax Order*,¹ when it said that the party whose goods and services are advertised in an unsolicited fax *is not always* the liable sender under the Telephone Consumer Protection Act (“TCPA”). The NAM agrees with Akin Gump that the Commission should clarify that a party whose goods and services are advertised is not the liable sender when its fax broadcaster “both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.”²

I. Introduction

The NAM is the largest manufacturing association in the United States, representing 14,000 manufacturers small and large in every industrial sector and in all 50 states.

¹ *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, 21 FCC Rcd. 3787 (2006) (“*2006 Junk Fax Order*”).

² Petition of Akin Gump Strauss Hauer & Feld LLP, CG Docket Nos. 02-278, 05-338 at 3 (filed February 26, 2019) (the “Petition”).

Manufacturing employs more than 12.75 million women and men across the country, contributing \$2.33 trillion to the U.S. economy annually. The NAM is committed to achieving a policy agenda that helps manufacturers here in the United States grow and create jobs.

Manufacturers, particularly manufacturers of pharmaceuticals and medical devices, often rely on fax messages to advertise their products to hospitals and doctor's offices. The medical industry has long relied on faxes to communicate because they interpret the Health Insurance Portability and Accountability Acts ("HIPAA") Privacy Rule³ as meaning that faxes provide "reasonable safeguards," while email generally does not.⁴ Further, the Office of the Inspector General of the Department of Health and Human Services ("OIG") published guidance warning pharmaceutical manufacturers that engaging in various traditional advertising methods may risk criminal liability under the federal anti-kickback statute,⁵ including educational seminars, free samples, and consultations.⁶

Given the limitations placed on how manufacturers of medical products may advertise, such manufacturers rely on faxes to share developments in their product offerings with the medical community. At the same time, manufacturers of medical products increasingly rely on third parties for sales and advertising.⁷

³ 45 C.F.R. § 160.103.

⁴ See U.S. Dep't of Health & Human Services, *Does HIPAA Privacy Rule permit a doctor, laboratory, or other health care provider to share patient health information for treatment purposes by fax, e-mail, or over the phone?* (last visited April 22, 2019), <https://www.hhs.gov/hipaa/for-professionals/faq/482/does-hipaa-permit-a-doctor-to-share-patient-information-for-treatment-over-the-phone/index.html>; see also Rachel Withers, *Why in the World Do Doctor's Offices Still Use Fax Machines*, SLATE (June 6, 2018), <https://slate.com/technology/2018/06/why-doctors-offices-still-use-fax-machines.html>.

⁵ 42 U.S.C. 1320a-7b(b).

⁶ U.S. DEP'T OF HEALTH & HUMAN SERVICES, OFFICE OF THE INSPECTOR GENERAL, COMPLIANCE PROGRAM GUIDANCE FOR PHARMACEUTICAL MANUFACTURERS (2003), <https://oig.hhs.gov/fraud/docs/complianceguidance/042803pharmacymfgnonfr.pdf>.

⁷ See Yogesh Bahl, *Managing third-party risks in the life sciences industry*, PHARMACEUTICAL COMMERCE (Jan. 27, 2015), <https://pharmaceuticalcommerce.com/opinion/managing-third-party-risks-in-the-life-sciences-industry/>.

Unfortunately, some third parties who sell medical products send unsolicited advertisements via fax in violation of the TCPA that include a manufacturer's products without the manufacturer's knowledge or consent. This practice has resulted in many manufacturers facing class action lawsuits that allege violations of the TCPA, despite the manufacturers having no knowledge of, or participation in, the creation or "sending" of the fax messages.⁸

The NAM therefore agrees with Akin Gump that the FCC should clarify its definition of a facsimile "sender" in order to hold violators of the TCPA liable and curtail damaging lawsuits against innocent players. FCC guidance would also be helpful to the courts to correct conflicting interpretations of sender liability in junk fax cases.

II. The Commission Should Explain When Advertisers are Not the Liable Senders of Junk Faxes, Encourage More Expedious Resolution of Junk Fax Cases and Protect Innocent Players

The Commission has authority to clarify what it meant in the *2006 Junk Fax Order*, and doing so will provide courts with the guidance they need to decide junk fax cases more easily at the summary judgment stage. Indeed, the Commission has provided similar guidance clarifying other aspects of the TCPA, such as by clarifying what it means to "initiate" a telemarketing call.⁹ By taking this proposed action, the Commission will better equip courts to curtail expensive and unnecessary litigation for innocent players and will encourage bad actors to concede liability to avoid the expense of trial.

⁸ See *Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800, 801 (6th Cir. 2018).

⁹ *In the Matter of the Joint Petition Filed by Dish Network, LLC, et al.*, 28 F.C.C. Rcd. 6574 (2003) (clarifying that "a seller does not generally 'initiate' calls made through a third-party telemarketer within the meaning of the TCPA.").

The growing problem of frivolous junk fax suits is readily apparent in cases like *Health One Medical Center, Eastpointe, P.L.L.C. v. Bristol-Myers Squibb Co.*¹⁰ There, plaintiff Health One Medical Center filed a putative class action against defendants Mohawk, Inc., Pfizer, Inc., and Bristol-Myers Squibb Co. (“BMS”), alleging that plaintiffs received unsolicited faxes from Mohawk Medical advertising several pharmaceutical products, including those made by Pfizer and BMS, which violated the TCPA because there was no opt-out notice.¹¹ In granting Defendants Pfizer and BMS’ motion to dismiss, the court noted that “other than the allegation that [defendants] sent the fax, plaintiff offers no other allegations or facts to justify this allegation,” and “has not alleged any action or relationship between defendants that would raise an inference that Pfizer knew Mohawk was sending the faxes.”¹²

At the same time, however, the court indicated that plaintiffs’ “reading of the regulation may be plausible,”¹³ despite a lack of evidence in the record that either BMS or Pfizer knew of or consented to the unsolicited fax advertisements, and despite the court’s characterization of the plaintiffs’ claims as “conclusory allegations.”¹⁴ Plaintiffs appealed, likely due to the court’s statements in dicta, resulting in over three years of wasteful litigation.

Cases like *Health One* are not uncommon and the Commission should issue guidance to close this loophole to provide courts with the tools they need to decide these cases early on. The requested guidance could have a broad positive impact, producing fairer, more consistent results without imposing undue expense on defendants or pressuring them into early settlement. Without

¹⁰ *Health One Med. Ctr., Eastpointe, P.L.L.C. v. Bristol-Myers Squibb Co.*, No. 16-CV-13815, 2017 WL 3017521, at *2 (E.D. Mich. July 17, 2017), *aff’d sub nom. Health One Med. Ctr., Eastpointe P.L.L.C. v. Mohawk, Inc.*, 889 F.3d 800 (6th Cir. 2018).

¹¹ *Id.* at *3.

¹² *Id.* at *7.

¹³ *Id.* at *9.

¹⁴ *Id.* at *7.

guidance, manufacturers could continue to face liability for the actions of any third party, no matter how tenuous the legal relationship between the two may be.

III. CONCLUSION

The NAM joins with Petitioners Akin Gump in asking the Commission to clarify what it meant in the *2006 Junk Fax Order* when it said that the party whose goods and services are advertised in an unsolicited fax *is not always* the liable sender. The Commission should clarify that a party whose goods and services are advertised is not the liable sender when its fax broadcaster “both commits TCPA violations and engages in deception or fraud against the advertiser (or blatantly violates its contract with the advertiser) such that the advertiser cannot control the fax campaign or prevent TCPA violations.” The Commission also should clarify that its junk fax regulations do not impose strict liability on entities simply because their goods and services are advertised. These clarifications would reduce the likelihood of frivolous class action suits against innocent parties under the TCPA, as well as give courts the tools they need to decide these cases more efficiently.

Dated: April 23, 2019

Respectfully submitted,

/s/_____
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